Supreme Court, U.S.
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NO. 85-1500

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROLAND V. ACOSTA,

Petitioner,

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. GEORGE FISCHER, HEAD OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. CHARLES OLIVIER, ADMINISTRATOR OF THE SOUTH LOUISIANA MEDICAL CENTER IN HOUMA, LOUISIANA; AND WAYNE HEAP, ASSISTANT SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
234 LOYOLA AVENUE, 7TH FLOOR
NEW ORLEANS, LOUISIANA 70112
TELEPHONE: (504) 568-5575

COUNSEL FOR RESPONDENTS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Should a Notice of Appeal filed subsequent to announcement of a ruling on a Rule 59 Motion, but prior to entry of that ruling on the clerk's docket, be considered timely under Federal Rule of Appellate Procedure 4?

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MOTION TO AFFIRM

Appellees move, in accordance with Rule 16.1(c) of this Court's Rules, to affirm the judgment of the Court of Appeals for the Fifth Circuit. As is shown, the question on which the decision of this case depends is so unsubstantial as not to require briefs on the merits or oral argument for its resolution.

The judgment below was clearly correct. The Court of Appeals did no more than apply well-established doctrine concerning the Federal Rule of Appellate Procedure 4 to undisputed facts.

STATEMENT OF THE CASE

On September 29, 1981, plaintiff Roland V. Acosta brought suit against the Louisiana Department of Health and Human Resources, the Secretary and Assistant Secretary thereof, and a hospital administrator under 42 U.S.C. §§1983 & 1985. The §1985 claim was dismissed on a Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss on February 19, 1982. The remaining claims against all defendants were dismissed on a Motion for Summary Judgment on December 20, 1982.

Plaintiff filed a Notice of Appeal on January 26, 1983. On February 23, 1983, the Fifth Circuit granted defendants' Motion to Dismiss the Appeal.

The defendants then moved for attorneys' fees alleging that the complaint was filed in subjective bad faith and that it was frivolous, unreasonable and without foundation. On June 7, 1983 District Judge Patrick E. Carr issued an Order of Reference referring the matter to Magistrate Eileen Shaver to determine what attorneys' fees, if any, should be awarded to defendants.

On July 29, 1983, Magistrate Shaver issued Findings and Recommendations recommending that attorneys' fees be denied. Upon defendant's objections to those Findings and Recommendations, on April 10, 1984, Judge Carr rejected Magistrate Shaver's findings and determined that defendants were entitled to attorneys' fees. Judge Carr referred the matter to Magistrate Ronald A. Fonseca for a determination of the amount of attorneys' fees to be awarded. On May 21, 1984, Magistrate Fonseca recommended that the amount be $19,953.75. Judge Carr issued an Order awarding that amount to defendants on June 25, 1984.

Plaintiff filed a Motion to Alter or Amend the Judgment under F.R.C.P. 59 on July 3, 1984. On August 1, 1984, a hearing was held on the motion and a ruling was announced by the court from the bench that the motion was denied. That afternoon plaintiff's attorney filed a Notice of Appeal. Two days later, on August 3, 1984, the Judgment on the Motion to Alter or Amend was entered on the docket. The Notice of Appeal was therefore filed after the judge's announcement of his intent but prior to his signing of a final order and entry thereof.

Defendants filed a Motion to Dismiss the appeal alleging that the Fifth Circuit Court of Appeals lacked jurisdiction because the Notice of Appeal was filed prior to entry of the order denying the Motion to Alter or Amend the judgment. On March 15, 1985, a motions panel of the United States Court of Appeals for the Fifth Circuit denied defendants' motion to dismiss the appeal. On November 6, 1985, the appeals panel of the United States Court of Appeals for the Fifth Circuit dismissed the appeal holding that the Notice was not timely filed. Plaintiff petitioned for rehearing, and on December 5, 1985, it was denied.

SUMMARY OF ARGUMENT

Plaintiff filed his notice of appeal after the announcement of the District Court's denial of his F.R.C.P. 59 motion but prior to the entry of the District Court's order. The plaintiff did not file a new notice of appeal within the time limit prescribed by F.R.A.P. 4(a)(4). Thus, the Court of Appeals lacked jurisdiction to hear the appeal.

F.R.A.P. 4(a)(2) makes it clear that the general rule allowing the notice of appeal to be filed between announcement and entry does not apply when the motions

enumerated in 4(a)(4), which includes a Rule 59 motion to alter or amend the judgment, have been filed. In that situation, in the clear language of the Rule itself, "A *new* notice of appeal *must* be filed within the prescribed time measured from the *entry* of the order disposing of the motion as provided above".

ARGUMENT

The sole question presented to this Honorable Court by the petitioner for a writ of certiorari to the Court of Appeals for the Fifth Circuit is whether that court properly interpreted F.R.A.P. 4(a)(4). Subsequent to the District Court's judgment against plaintiff ordering him to pay substantial attorneys' fees to defendants for having brought a suit that was deemed frivolous, vexatious, and without foundation, plaintiff filed a Motion to Alter or Amend judgment under F.R.C.P. 59(e).

After the oral denial of plaintiff's F.R.C.P. 59 motion, but prior to the entry of the judge's order, plaintiff filed a notice of appeal in the District Court. Because plaintiff did not follow the clear language of F.R.A.P. 4, his notice of appeal had absolutely no effect. Plaintiff did not file an additional notice of appeal after the entry of the District Court's final order and thus he allowed his time for appeal to elapse.

F.R.A.P. 4(a)(4) states (in pertinent part):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party ... (iii) under Rule 59 to alter or amend the judgment ... the time for appeal for all parties *shall run from the entry* of the order ... granting or denying any other such motion. A notice of appeal filed before the disposition of any of the

> above motions *shall have no effect.* A *new notice* of appeal *must* be filed *within the prescribed time measured from the entry* of the order disposing of the motion as provided above... (Emphasis added).

Plaintiff admits that his appeal from the District Court was governed by this Rule. Plaintiff's only contention is that the Court of Appeals erred in its definition of "disposition" as quoted above. Whereas the Court of Appeals read "disposition" to mean the *entry* of the order, plaintiff desired that Court to read "disposition" as *announcement* of the order. In effect, plaintiff wishes to overlook the entire body of the Rule in order to take the word "disposition" out of context.

Section (a)(4) of Rule 4 is specific in establishing a distinct time within which a notice of appeal *must* be filed. It is specific in stating that this time period begins *from the entry* of the order granting or denying a motion covered by this section. Defendants respectfully urge that there can be no alternative reading of the Rule.

Plaintiff's contention is more clearly unfounded and illogical in light of Section (a)(2) of the Rule. This Section reads:

> *Except as provided* in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof. (Emphasis added).

Thus this Section clearly indicates that the general allowing of the notice of appeal to be filed between announcement and entry *will not apply* when the motions

enumerated in F.R.A.P. 4(a)(4) have been filed. Plaintiff cannot simultaneously admit that F.R.A.P. 4 (a)(4) governs his case while asking that his notice be treated under F.R.A.P. 4(a)(2).

Moreover, the Fifth Circuit's reading of Rule 4(a)(4) is consistent with this Court's interpretation of the Rule. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), the respondent filed a notice of appeal while a motion to alter or amend judgment was pending before the District Court. Addressing the question posed by an untimely notice of appeal, this Court stated:

> Under the plain language of the current Rule, a premature notice of appeal "shall have no effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is "mandatory and jurisdictional." 459 U.S. at 61.

The Court of Appeals also relied on *Griggs, supra*, in *Van Wyk El Paso Inv., Inc. v. Dollar Rent-A-Car Systems, Inc.*, 719 F. 2d 806 (5th Cir. 1983). There, a notice of appeal was filed after the judge's lawclerk had notified counsel of the District Judge's decision on the motion to reconsider, but before the order officially denying the motion was entered. The court held that the notice filed was ineffective and that the court lacked jurisdiction to hear the appeal.

CONCLUSION

This court must affirm the Court of Appeals ruling on the application of F.R.A.P. 4(a)(4). The petitioner has alleged no facts or error of law that in any way indicate an error by the Court below.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

By: _____
PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the Respondents herein and that two copies of the above Motion to Affirm in response to a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit were served upon counsel for Petitioner, first class postage prepaid, addressed to their offices in New Orleans, Louisiana, this 7th day of May 1986.

PATRICIA NALLEY BOWERS